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NO. 87-906

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN W. ROBERTS, et al.,

Petitioner

versus

UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

A. The Government has misconstrued the DiBella test regarding appealability of Rule 41(e) Motions.

The Opposition Memorandum filed by the Government in this action demon-

strates the need for the Court to resolve the inconsistent interpretations given this Court's decision in DiBella v. United States, 369 U.S. 121 (1962) by the Courts of Appeal.

The issue before the Court on the Petition is whether the denial of a motion under Rule 41(e) is an appealable order when there is no criminal proceeding pending. It does not appear to be disputed that a Rule 41(e) Motion is an independent civil proceeding so that a decision on the motion would normally be an appealable order. Thus, in its initial response to the Motion in this case, the Government stated:

> It is clear that this Rule 41(e) motion is not ancillary to any pending criminal proceeding but is an independent civil proceeding. (Defendant's Brief Pursuant to Court's Order of May 22, 1986, p. 3).

The Government then cited United States v. Koenig, 290 F.2d 166 (5th Cir. 1961) and DiBella v. United States, supra, for the proposition that "If there is no criminal proceeding pending, a motion for suppression of evidence and return of such (evidential) property is an independent civil suit." Id. There is an exception to this general rule when there is a criminal proceeding already in existence when a Rule 41(e) motion is filed. In that case, the courts of appeal must determine whether the denial of the motion should still be considered an independent proceeding, from which an appeal will lie, or, instead, as an integral part of the existing criminal trial process. It is in this latter context that DiBella arose, and only in this context that it

should be applied:

> Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent. (DiBella v. United States, supra, at 131-132)

The lower courts have interpreted this sentence from DiBella as establishing a two-pronged test: (1) the motion must be for the return of property; and (2) the motion must not be tied to a criminal prosecution in esse. See, In Re Grand Jury Proceedings, 716 F.2d 493, 495 (8th Cir. 1983).

The Government's argument in its Opposition Memorandum evidences how the real focus of DiBella has been lost and how some courts are applying DiBella in situations where it was never intended. The Government also argues, with no

apparent recognition of the inconsistency in its argument, that the denial of the Rule 41(e) motion is not an appealable order because it was not an independent proceeding, while stating, at the time the motion was filed, that it was an independent proceeding not ancillary to a pending criminal proceeding, when that position supported its need for additional time to respond to the motion. (Defendant's Brief Pursuant to Court's Order of May 22, 1986).

The Government suggests that "This case does not present any issue concerning the second part of the DiBella test." (Memorandum of Respondent, p. 4). The Government further states that "because petitioner's appeal does not meet the first part of

the test, the court of appeals properly did not reach the question whether petitioner's Rule 41(e) action was tied to a criminal prosecution." (Memorandum of Respondent, p. 4). Thus, the Government argues that the existence of any suppression-type language in a Rule 41(e) motion automatically precludes appeal of a denial of the motion, regardless of whether there was any criminal proceeding in existence, because of the following language: "only if the motion is solely for return of property. . . ." DiBella, supra, at 131. (Emphasis added) Therefore, the Government does not consider the other prong of the DiBella test, which involves whether the motion is tied to a criminal prosecution in esse and which, it is submitted, is the

foundation of the DiBella decision in the first place.

One must examine the context of DiBella in order to crystallize the issue now before the Court. The actual facts of DiBella involved two cases in which the Rule 41(e) movant had been arrested before the motion was filed. The motion sought the return of property which had been seized as part of the arrest process. The Court was concerned with what was, in substance, a suppression motion being appealed when there was a criminal case underway. The Court noted:

> "Presentations before a United States Commissioner, as well as before a grand jury, are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then

fairly in train. DiBella v. United States, 369 U.S. 121, 131 (1969).

In this context, it is clear that the Court was primarily concerned with the disruption of the criminal trial process, which was already underway at the time the Rule 41(e) motion was filed, if an appeal of the Rule 41(e) denial was permitted. It is also clear that if there had been no criminal prosecution underway, then the Court's concern over disruption of the criminal trial process would not have existed. This clear distinction is supported by the fact that Rule 41(e) was amended in 1972, after the DiBella decision. Subdivision (e) now retains only those provisions of the original rule dealing with a motion for the return of property, while the provisions dealing with

motions to suppress have been moved to subpart (f). The final sentence of Rule 41(e), as amended after DiBella, now states: "If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12." This change emphasizes the Court's interest in preventing the disruption of the criminal trial process by a Rule 41(e) motion appeal when the criminal process has already begun, but not otherwise. It is not disputed in this case that no indictment or information had been filed at the time of the motion, and there was no hearing on the motion, despite Petitioner's request for a hearing. Therefore, Petitioner's Rule

41(e) motion could not be construed as a motion to suppress evidence in a pending criminal proceeding. Rule 41(e), as amended, expressly provides that "If the motion [for return of property] is granted, the property shall be restored and it shall not be admissible in evidence at any hearing or trial." Only if the motion is made or comes on for hearing "after an indictment or information is filed," is the motion to be treated as a motion to suppress. Thus, Rule 41(e), by its terms, contemplates precisely the type of motion filed by Petitioner, where no criminal case is pending; and both its denial and the denial of the appeal were in error.

The Government concedes there is no criminal prosecution in esse in this

proceeding. At the time of the trial court's ruling, through the entire appellate process, and even currently, there has been no arrest, no arraignment, no indictment, no information, no grand jury presentment, and no other criminal proceeding commenced against Roberts. Since the present case was not tied to any criminal proceeding, in esse or otherwise, the denial of the Rule 41(e) motion must have been an order in an independent proceeding which was appealable under the mandate of DiBella because it could not be anything else. In reality, the Government argument is that Petitioner should not be allowed to appeal the denial of his Rule 41(e) motion because someday there might be a criminal proceeding against him, and, therefore, someday he

might be able to appeal the denial of his motion when, and if, there is ever an appeal of the hypothetical criminal proceeding. This is not the law; and, to the extent that the decision below reflects this result, it should be reversed.

The denial of appellate jurisdiction by the Court of Appeals was clearly in error, and the Court is urged to grant certiorari to review that decision and to clarify the obvious confusion in the Courts of Appeal regarding the DiBella decision.

B. The Court of Appeals erred by failing to examine the primary purpose of the Rule 41(e) Motion.

Even if the DiBella rationale, as interpreted by the courts of appeal, applied in this case, the court below

erred in its application of that test. As noted in the Petition, some courts of appeal have interpreted the word "solely" in the first prong of the DiBella test as requiring an inquiry into whether the primary purpose of the Rule 41(e) Motion was to obtain the return of the items seized or to obtain a suppression order. Imperial Distributors, Inc. v. United States, 617 F.2d 892, 895 (1st Cir. 1980); United States v. Premises Known as 608 Taylor Avenue, 584 F.2d 1297, 1300 (3rd Cir. 1978); In re Grand Jury Proceedings, 716 F.2d 493, 495 (8th Cir. 1983). The Court of Appeals for the Fourth Circuit, on the other hand, appears to hold that any suppression language in a motion is enough to prevent the motion from being "solely for the return of property."

United States v. Regional Consulting Services, 766 F.2d 870 (4th Cir. 1985), a position seemingly adopted by the Court of Appeals for the Eleventh Circuit in this case. Respondent argues that the Court of Appeals for the Fourth Circuit did, in fact, examine the primary purpose of the motion in Regional Consulting Services, so there is no conflict in the circuits on this point. Apparently, then, Respondent is of the view that all of the courts of appeal require an examination of the primary purpose of the motion.

Even under that interpretation, which Petitioner contends is incorrect, it is clear that the court below did not examine the primary purpose of the motion and, instead, based its decision on the mere existence of suppression-

type language in the motion. Thus, the court below disposed of jurisdiction in this matter in two sentences:

> It is only when the sole purpose of a Rule 41(e) motion is to retrieve property and not an effort to suppress evidence that its denial is appealable . . . Because this motion falls, at least in part, into the latter category, this court lacks jurisdiction at this stage to review its denial. (Opinion dated September 2, 1987).

In one sentence, the Court concluded that the motion had more than one purpose, yet failed to consider the primary purpose of the motion. Apparently, the Eleventh Circuit reasoned that the mere existence of suppression language in the motion automatically foreclosed the possibility of appeal, whether or not a criminal case was then in esse.

If DiBella applies in this proceeding, then the Court of Appeals for the Eleventh Circuit erred by not examining the motion in its entirety and making a determination as to the primary purpose of the motion. As Rule 41(e) is now written, a motion for return of property is automatically treated as a motion for suppression; consequently, based on the decision below, no Rule 41(e) motion would ever be appealable, even if there was never a criminal proceeding in esse, if the moving party requests in his motion both remedies expressly afforded by the Rule: return of the property and an order preventing its use in any subsequent judicial proceeding. If this were the law, then both DiBella and the second half of Rule 41(e) would be meaningless.

CONCLUSION

The decision below is in conflict with similar decisions in the other courts of appeal, is an erroneous application of Rule 41(e) itself, and should be reversed. For the foregoing reasons, it is respectfully requested that the Court grant the Petition for Certiorari to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the within and foregoing Reply Brief of Petitioner was served upon opposing counsel by depositing three copies of same in the United States Mail, first class postage prepaid, and properly addressed as follows:

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This, the 12 day of February 1988.

Robert J. Hipple
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Sworn to and
subscribed before
me:

Lynn Gravel
Notary Public

Notary Public, Dekalb County, Georgia
My Commission Expires Jan. 3, 1990